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CLERK US DISTRICT COURT  
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14 **IN THE UNITED STATES DISTRICT COURT**  
 15 **FOR THE EASTERN DISTRICT OF VIRGINIA**

16 **UNITED STATES OF AMERICA** *ex rel.*  
 17 **DANE SMITH**, an individual,

18 Plaintiffs,

19 vs.

20 **VMWARE, INC.**, a Delaware corporation;  
 21 **CARAHSOFT TECHNOLOGY CORP.**, a  
 22 Maryland corporation;

23 Defendants.

Case No. 1:10cv769 (JCC/JFA)

**FIRST AMENDED COMPLAINT**

**DEMAND FOR JURY TRIAL**

**FILED UNDER SEAL  
 PURSUANT TO  
 31 U.S.C. § 3730(b)(2)**

ORIGINAL

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1 On behalf of Plaintiff UNITED STATES OF AMERICA, and on his own behalf, Plaintiff  
2 and Relator DANE SMITH alleges as follows:

3 **I. INTRODUCTION**

4 1. This action alleges that, since at least 2000, Defendants have knowingly  
5 defrauded, and continue to defraud the United States by not providing government purchasers  
6 with comparable pricing, discounts, and sale terms as those received by Defendants' commercial  
7 customers, in violation of law. As such, VMware, Inc. ("VMware") and Carahsoft Technology  
8 Corp. ("Carahsoft") (collectively "Defendants") have knowingly submitted false claims, made  
9 false statements, and conspired to defraud the federal government.

10 2. Among other things, Defendants have defrauded the government by furnishing  
11 the General Services Administration ("GSA") with inaccurate pricing, inaccurate disclosures,  
12 and incomplete information about the sales of VMware software, licenses, and related  
13 maintenance, professional, and educational services. As a result of Defendants' knowing  
14 submission of false pricing information, the government has paid higher prices on VMware  
15 products and services than it should have paid.

16 3. Defendants' knowing submission of false and fraudulent claims for payment  
17 constitutes a violation of the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA"). As a  
18 result of their fraudulent conduct, Defendants have caused the United States to sustain a direct  
19 loss of funds and damage to its interests.

20 4. Defendants made false claims to Plaintiff United States for payment for products  
21 and services by misrepresenting the amounts that Defendants charged other customers for the  
22 same products and services, and by over-representing to Plaintiff United States the quantity of  
23 Defendants' products and services that Plaintiff needed.

24 5. Defendants concealed the fact that they did not have a right to those payments by  
25 means of the false claims and representations described in this Complaint.

26 6. VMware is the market leader in "virtualization" software technology.  
27 Virtualization software allows for the consolidation of multiple physical computers and servers  
28 into one. For example, a company with 100 physical servers, after purchasing VMware's  
virtualization products, will be able to perform the same amount of computing function with only

1 10 physical servers. The technology thus allows companies to cut down on hardware costs,  
2 energy costs, and space dedicated to physical servers.

3 7. The technology is also useful to the government and its agencies, whose use of,  
4 and need for, robust computing systems are comparable to the biggest private companies in the  
5 world. In selling to the government, however, VMware and Carahsoft have systematically  
6 charged more than they charge comparable commercial customers for the very same products and  
7 services.

8 8. Defendants have done so by violating express federal laws, regulations, and  
9 contractual terms that are designed to ensure that the government receives the best prices  
10 available.

11 9. Defendants actively concealed the acts alleged herein from the government.  
12 Defendants never informed the government of the discounted prices they charged their other  
13 customers, and never informed the government that their prices on the GSA schedule were  
14 falsely inflated.

15 10. This is precisely the type of conduct the False Claims Act is designed to combat.  
16 The FCA was originally enacted at the request of President Lincoln during the Civil War. The  
17 president believed that the Union Army was being defrauded by unscrupulous contractors. The  
18 Act was substantially amended by Congress in 1986 and 2009 to enhance the government's  
19 ability to recover losses sustained as a result of defendants' fraud. At those times, Congress  
20 determined that fraud against the government was pervasive and that the FCA, which Congress  
21 described as the primary tool for combating government fraud, was in need of strengthening.  
22 Congress intended that the amendments create incentives for individuals with knowledge of  
23 fraud against the United States to disclose the information without fear of reprisals or  
24 government inaction, and to encourage the private bar to commit legal resources to prosecute  
25 fraud on the government's behalf.

26 11. Any person who violates the FCA is liable for a civil penalty of up to \$11,000 for  
27 each violation, plus three times the loss sustained by the United States. 31 U.S.C. § 3729(a); 64  
28 Fed. Reg. 47099, 47103 (1999).

12. Based on the FCA, *qui tam* Plaintiff Dane Smith ("Smith" or "Relator") seeks to recover treble damages, civil penalties, attorneys' fees and costs, and other relief for the federal violations alleged herein, including retaliation in violation of the federal False Claims Act, 31 U.S.C. § 3730(h).

13. Defendant VMware also committed violations of state law, including wrongful termination in violation of public policy. Smith seeks to recover all available damages, penalties, and other relief for the state violations alleged herein.

## II. PARTIES

14. The Plaintiffs in this action are the UNITED STATES OF AMERICA, through Plaintiff and Relator DANE SMITH, who also brings claims on his own behalf.

15. Relator and Plaintiff DANE SMITH ("SMITH") is a former employee of defendant VMware.

16. Defendant VMWARE, INC. ("VMware") (NYSE: VMW) is a Delaware corporation with its principal place of business at 3401 Hillview Ave., Palo Alto, California. At all times relevant hereto, VMware conducted business in the Eastern District of Virginia.

17. Defendant CARAHSOFT TECHNOLOGY CORP. ("Carahsoft") is a privately held Maryland corporation that distributes products, including those of VMware, to local, state, and federal governments. It provides these products to the federal government through its contract, GS-35F-0131R, with the GSA. Carahsoft's principal place of business is located at 12369 Sunrise Valley Drive, Suite D2, Reston, Virginia.

## III. JURISDICTION AND VENUE

18. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3732, the latter of which specifically confers jurisdiction on this Court for actions brought pursuant to 31 U.S.C. §§ 3729 and 3730.

19. Personal jurisdiction and venue are proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1395(a), and 31 U.S.C. § 3732(a), as one or more of the Defendants or their agents can be found, reside, transact business, or otherwise engaged in fraudulent conduct within the district.



1 **IV. THE BASICS OF VIRTUALIZATION**

2 20. VMware is the market leader in – and in fact has a near-monopoly on –  
3 “virtualization” software technology. Virtualization software allows for the consolidation of  
4 multiple physical computers and servers into one. For example, a company with 100 physical  
5 servers, after purchasing VMware’s virtualization products, will be able to perform the same  
6 amount of computing function with only 10 physical servers. The technology thus allows  
7 companies to cut down on hardware costs, energy costs, and space dedicated to physical servers.

8 21. The following pictures show a server room before use of VMware’s virtualization  
9 software, and after:

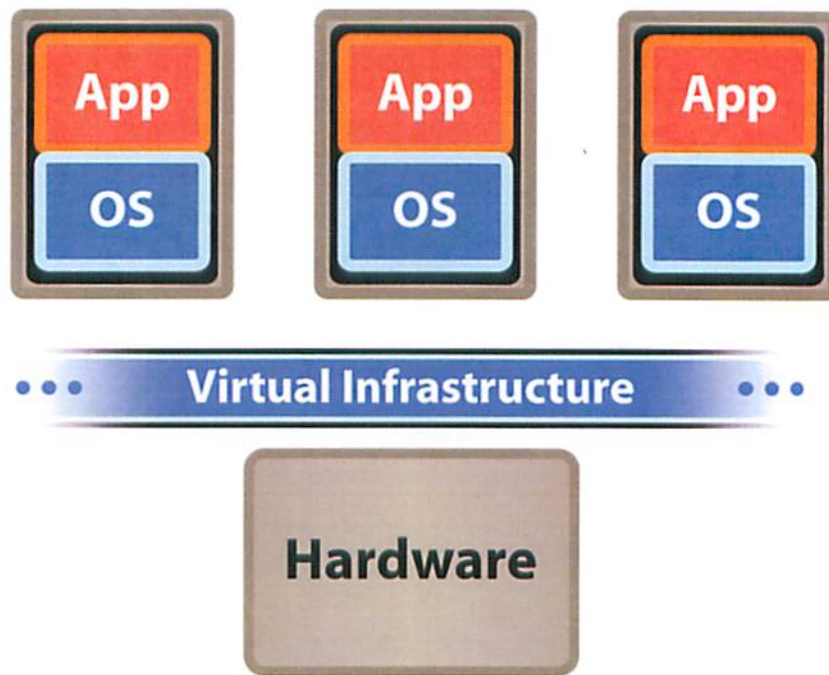


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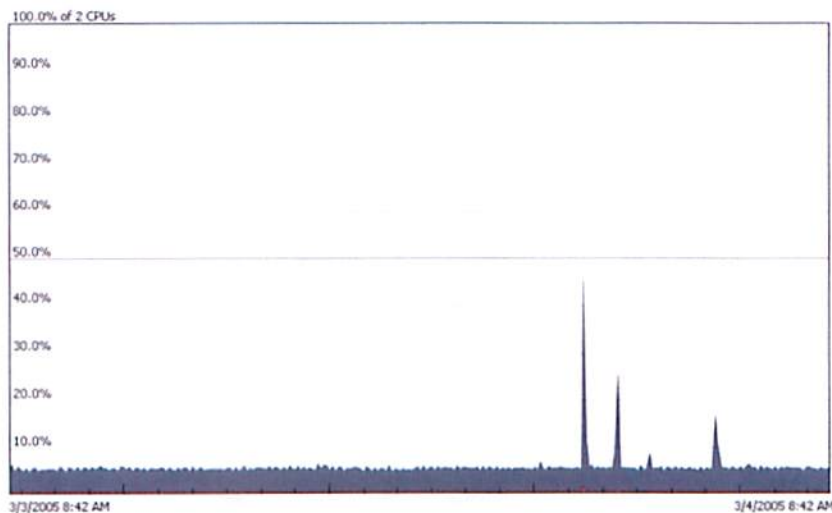


22. VMware's virtualization technology is based on the fact that the vast majority of computer hardware is underutilized. For example, a typical desktop computer or server, at any given moment, will typically only be utilizing 10% or less of its Central Processing Unit's (CPU's) capacity. Virtualization allows multiple "virtual machines" to run on one CPU, thereby maximizing use of the CPU, and making the entire system more efficient. The virtualization technology consists of a layer of software that slides between the operating system and the hardware, allowing one physical machine to act as several machines, each with their own operating system and applications, as illustrated here:



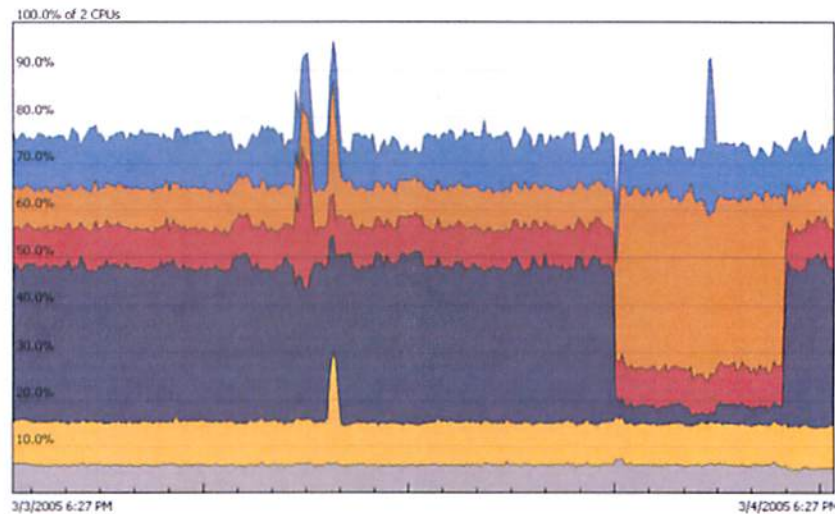


23. CPU efficiency can thus be increased from this:



To this:

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24. As the world rapidly increases its need for computing capacity, VMware's virtualization technology has become indispensable to entities of all sizes. As a result, VMware has grown into the fourth most valuable software company in the world. According to its most recent Form 10-K filed with the SEC, VMware had total revenues in 2010 of over **\$2.8 billion**, and has reported total revenues for 2011 of over **\$3.77 billion**. VMware's growth has been explosive, having had only \$700 million in revenues in 2006.

25. Much of this growth is due to VMware's sales to the federal government. As stated in a 2009 VMware press release:

**"Our solid third quarter results were driven by strength in the US Federal sector, increased transaction volumes and particularly robust growth in our maintenance renewals,"** said Mark Peek, chief financial officer.

26. In 2011, VMware's CEO, Paul Maritz, emphasized how deeply VMware had penetrated the federal government, stating:

VMware is deployed throughout the Executive, Legislative, and Judicial branches of the U.S. Federal Government, including the Department of Defense and all branches of military and joint commands, all Cabinet-level agencies, and many quasi-governmental agencies and NGOs. The VMware vision for cloud computing in the federal government focuses on enabling agencies to adopt cloud while preserving existing investments. With virtualization as the foundation, agencies can build cloud architectures that are flexible enough to support a unified private and hybrid cloud model.

**IV. DEFENDANTS VIOLATED THE FALSE CLAIMS ACT BY FALSELY  
INFLATING THEIR GSA SCHEDULE PRICE**

**A. The Federal Supply Schedule**

27. A plurality of VMware's sales to the federal government are through the General Services Administration's ("GSA") "Federal Supply Schedule" ("FSS"), or "Multiple Award Schedule" ("MAS"). Federal agencies can utilize the MAS to buy goods and services at a fixed price. The MAS is created from hundreds of pre-negotiated contracts. Procurement managers from government agencies can view these agreements and make purchases from the schedule, knowing that the contract terms and legal provisions have already been negotiated on their behalf.

28. In order to participate in the MAS program, vendors must agree to disclose their "commercial sales practices" ("CSP"), which include: (1) past commercial and government sales data, (2) discounts and concessions offered to their most favored customers, and (3) current published commercial catalogs and/or price lists from which such discounts are offered. GSA also requires vendors to disclose if they deviate from their standard written pricing policies, and to include a discussion of the frequency and nature of those deviations. In addition, GSA requires that vendors provide pricing information that is current, accurate, and complete. 48 C.F.R. § 515.408, 48 C.F.R. § 552.212 70.

29. GSA contracting officers determine whether the potential vendor's prices are fair and reasonable by comparing the prices and discounts that a company offers the government with the prices and discounts that the company offers to its commercial customers, as reported by the company. GSA attempts to obtain "Most Favored Customer" status for individual government purchasers, which means it seeks to obtain prices comparable to a vendor's best price to its most favored customers making similar purchases. 48 C.F.R. § 538.270.

30. When the vendor does not have commercial sales to the general public, it must provide to GSA the manufacturer's sales data if the manufacturer's sales under any resulting contract are expected to exceed \$500,000. The vendor must also obtain written authorization from the manufacturer for government access to the manufacturer's sales records for the purpose of verifying the sales data submitted by the manufacturer. *See* 48 C.F.R. § 515.408(b)(5).

1           31. Another contract provision designed to protect the government is the “price  
2 reductions clause” (“PRC”), which ensures that initially awarded prices remain fair and  
3 reasonable throughout the life of the contract. Under the PRC, the contracting officer and the  
4 vendor agree, before the contract is awarded, on: (1) the customer (or category of customers) that  
5 will be the basis of the award (called the “tracking customer”), and (2) the government’s price or  
6 discount relationship to the tracking customer (or category of customers). This relationship is  
7 maintained throughout the contract period. If the contractor reduces the tracking customer’s  
8 price at any time during the contract period, the government also receives the benefit of any such  
9 reduction. 48 C.F.R. § 552.238-75(a), (c).

10           32. VMware has sold its products to federal agencies through the MAS program for  
11 several years. Various entities have entered into MAS contracts through which VMware  
12 products have been sold, and the allegations set forth herein apply to those entities.

13           **B. Carahsoft’s GSA Contract**

14           33. Currently, Carahsoft holds a GSA contract, number GS-35F-0131R, for sales of  
15 general purpose commercial information technology equipment, software, and services. The  
16 period covered by the contract is November 19, 2004, through May 7, 2012.

17           34. In January 2007, VMware products were added to Carahsoft’s GSA contract. As  
18 such, Carahsoft became the exclusive seller for VMware products to the federal government.

19           35. During the fourth quarter of 2007 alone, VMware had approximately 10,000 sales  
20 transactions totaling \$264 million. Of this amount, about 680 transactions, totaling \$27 million,  
21 were sales to the federal government through the Carahsoft GSA contract.

22           **C. Carahsoft’s Sales of VMware Products Through the MAS**

23           36. VMware and Carahsoft knowingly violated the GSA regulations by failing to  
24 provide the federal government with accurate and complete pricing information for their  
25 commercial and government sales, and by failing to report subsequent price reductions and  
26 discounts offered to commercial customers. As a result, the federal GSA schedule contains  
27 falsely inflated prices for VMware’s products (sold through Carahsoft, as described below).



1           37. As a result, all of Defendants' sales to the federal government through the MAS  
2 are based on fundamentally false information, and all claims for payment under those sales  
3 therefore constitute false claims.

4           **D. The Disparity Between Commercial Pricing and Government Pricing**

5           38. VMware's pricing structure is heavily discount-based. VMware maintains a  
6 standard list price, which is decreased based on multiple discount programs.

7           39. The list price for VMware's products is generally the same for commercial  
8 customers and government customers. The discounts provided, however, vary wildly, with  
9 commercial customers receiving far more discounts.

10          40. Based on the incomplete and inaccurate pricing data provided by VMware to the  
11 federal GSA, Defendants' listing in the federal GSA schedule provides for a 12% discount off of  
12 VMware's main product.

13          41. This 12% discount does not even approach VMware's most favorable discount to  
14 commercial customers. Indeed, the 12% discount is far less than VMware's average or median  
15 discount to commercial customers, and there are few, if any, commercial customers who do not  
16 receive a more favorable discount.

17          42. Over the past several years, VMware has added multiple standard discount  
18 programs for commercial customers. VMware has also added a few limited, discretionary  
19 discount programs for federal customers on top of the 12%. Nonetheless, the disparity between  
20 VMware's standard discounts for commercial customers, and federal customers, remains  
21 staggering. The following chart illustrates the disparity between VMware's standard discount  
22 programs:

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43. There was never any legitimate justification for this discrepancy. Indeed, VMware offered governments outside of the United States **better** discounts than were offered to commercial customers.

44. In addition to VMware's standard discount programs, VMware often negotiates *ad hoc* discounts for commercial customers in the form of contracts called Enterprise License Agreements ("ELAs"). ELAs typically provide discounts even greater than are available through VMware's standard discount programs.

45. VMware also arranges some commercial deals through "Special Pricing Forms" (SPFs), which provide additional *ad hoc* discounts on top of VMware's standard discounts.

46. VMware did not report ELA or SPF pricing to the federal GSA, nor has VMware updated the GSA with the commercial discount programs that it has rolled out since the GSA price was set. Accordingly, the GSA schedule, which was initially based on false information, has grown even more fraudulent, and fails to provide the government with the best discounts available.

1           47. As a result, all of Defendants' sales to the federal government through the GSA  
2 schedule are based on fundamentally false information, and all claims for payment under those  
3 sales therefore constitute false claims.

4           48. Additionally, the false information contained on the GSA schedule materially  
5 impacted Defendants' sales to the federal government that did not go directly through the GSA  
6 process. For example, on information and belief, the GSA schedule price is the starting point, or  
7 otherwise materially impacts, the negotiation of prices on government contracts that are greater  
8 than \$500,000, and therefore do not go directly through the GSA procurement process.  
9 Accordingly, the false information upon which the GSA schedule is based materially impacts and  
10 infects all such negotiations and resulting contracts, and any claims for payment under those  
11 contracts constitute false claims.

12           49. Furthermore, on information and belief, many non-GSA contracts between  
13 Defendants and the Government contain provisions that require Defendants to provide the  
14 Government with the best prices made available to commercial customers for the same products.  
15 Defendants knowingly violated such contractual requirements by systematically charging the  
16 Government more than their other customers.

17           E. Use of "Consolidation Ratios" and Other Means to Further Inflate Prices to  
18 the Government

19           50. In addition to charging the Government more per license of VMware's  
20 virtualization software than they should have, Defendants overcharged the Government in a  
21 second way: intentionally over-representing the number of units that government customers  
22 needed to buy.

23           51. For example, for a commercial customer needing to virtualize 100 physical  
24 servers, VMware might advise the customer that those 100 physical machines can be  
25 consolidated through virtualization onto only 10 physical servers. Hence the customer will only  
26 need to purchase 10 licenses. The number of physical machines that can be consolidated onto  
27 one machine is referred to by VMware as the "consolidation ratio." In this example, the  
28 consolidation ratio would be 10:1.

52. VMware's internally published acceptable consolidation ratio standard is between 4:1 and 6:1. Any ratio higher than that was to be substantiated in writing and spelled out in detail in the ELA Template Worksheet circulated internally for approvals. Ranges above 6:1 were intended to be permitted only under the most exceptional circumstances. However, consolidation ratios far in excess of 6:1 for commercial customers were commonplace and there was no enforcement of internal policy requiring detailed rationale or explanations for the exceptionally high discounting for commercial customers.

53. For a government customer, however, with the same number of physical servers, and the same basic computing needs, VMware will advise a lower consolidation ratio, such as 4:1. With a 4:1 consolidation ratio, the government would have to buy 25 licenses, rather than just 10. Moreover, the government would still be left with 25 physical servers, and all of the energy, hardware, and support costs associated therewith.

54. Due to VMware's dominance of the market for virtualization software, most government purchasers lack the negotiating leverage, and the knowledge, to challenge VMware's assertion of the appropriate consolidation ratio.

55. VMware thus essentially disguises additional discounts to its commercial customers, and sells the government more licenses than it wants or needs, by misrepresenting the appropriate consolidation ratios for government purchasers. This occurs in many contracts with the Government – not just those that are established through the MAS.

56. However, the impact is compounded in the MAS program, because Defendants fail to report the discrepancies in consolidation ratios to the federal GSA. The GSA schedule price is therefore higher than it would be otherwise.

57. Consequently, Defendants' charges to the Government for VMware licenses and attendant services violate the False Claims Act.

58. Defendants' upper-level management, executives, and directors were well aware of the discrepancies between consolidation ratios provided to commercial customers and those provided to the government. Among those to whom these discrepancies were reported were VMware's Vice President of Audit and Compliance, Susan Insley, the Audit Committee of the



1 Board of Directors (including Michael Browne, Dennis Powell and Renee James), and CEO Paul  
2 Maritz.

3 59. VMware management knew that the manipulation of consolidation ratios was  
4 potentially problematic, but believed that if the terms of commercial ELAs remained hidden, the  
5 manipulation would not be caught. Accordingly, VMware Senior Management often referred to  
6 ELA commercial pricing as “black box” ELA pricing. For example, VMware entered into an  
7 ELA with the UK Ministry of Defense that was far more favorable than a larger ELA entered into  
8 with the United States Navy Marine Corps Internet (NMCI) during the same time period. Jeff  
9 Littlejohn, then the Director of Systems Integrators and Outsourcing for VMware, expressed to  
10 Aileen Black and Carl Eschenbach his concern that the more-favorable terms of the UK deal  
11 would come to light. Littlejohn sought reassurance that the consolidation ratios and other key  
12 components of the UK ELA were hidden via the “black box ELA price” model. Eschenbach  
13 responded by confirming that: “On ELA’s we do not disclose discounting, it’s a black box  
14 pricing model.”

15 60. Even worse than the consolidation ratio disparity, VMware offers many of its  
16 commercial customers contracts that allow for the unlimited addition of licenses during the term  
17 of the contract, at no extra cost.

18 61. For example, in September of 2007, VMware offered eBay a contract for 1,000  
19 licenses, at a discount of 53% off the list price. The 1,000 license figure was based on a  
20 recommended consolidation ratio of 8:1. In addition, VMware allowed eBay to add an unlimited  
21 number of additional licenses to the contract, at no further charge, for the two-year term of the  
22 contract.

23 62. The terms of this eBay deal are of the type offered by Defendants’ to their most  
24 favored commercial customers. The federal government should have received comparable terms,  
25 but did not.

26 **F. Defendants Overcharge the Government Further on Support and**  
27 **Subscription Services**

28 63. Much of Defendants’ revenues come in the form of “Support and Subscription”  
 (“SnS”) charges. All buyers of VMware’s software must purchase SnS packages along with the

1 software. Among other things, SnS services provide support, software upgrades, and software  
 2 patches. The SnS packages vary in their term (usually one to three years) and in the level of  
 3 support (e.g., 12 hours per day phone support versus 24 hours a day phone support).

4 64. Generally, the price for SnS services for commercial customers is set as a  
 5 percentage of the net price of the software purchased (the list price less the discounts). Thus, for  
 6 example, a commercial customer will be offered SnS for 20% of the net price of all of the  
 7 software purchased. If the customer pays \$10,000 for software (discounted from a list price of  
 8 \$20,000), the customer will pay an additional \$2,000 per year for SnS.

9 65. Government customers, however, will typically be offered SnS based on a  
 10 percentage of the list price of the software purchased. Thus, if a government customer pays  
 11 \$15,000 for software (discounted from a list price of \$20,000), Defendants will charge the  
 12 government customer 20% of the \$20,000 list price for SnS: \$4,000 per year.

13 66. SnS thus compounds the disparity between the discounts Defendants offer  
 14 commercial customers and the discounts Defendants offer the government. Moreover, as with  
 15 the software prices, SnS prices are listed on Defendants' federal GSA schedule, at an inflated  
 16 price based on false and incomplete information.

17 **G. Additional Examples of Pricing Disparities**

18 67. A typical commercial purchase is illustrated by Defendants' sale to Commercial  
 19 Customer A ("Customer A") on December 28, 2007. The sale was for 794 VI3 licenses. The  
 20 contract used a consolidation ratio of 7 to 1, offered a discount of 56% (actually 56.1828%) off  
 21 the list price of the licenses, and priced the SnS services at 18% of the net price of the software  
 22 for the 3-year term of the contract.

23 68. Defendants also provided Customer A with an ELA that allowed an unlimited  
 24 number of licenses to be obtained for free, meaning that it could legally download an infinite  
 25 number of VI3 licenses and an infinite amount of SnS services on those licenses within the next  
 26 3 years at no additional cost. The unlimited ELA provision was valuable to Customer A because  
 27 it had 8,000 servers with 16,000 CPUs and thus was likely to need additional licenses.

28 69. For this sale, the average cost of each of the original 794 VI3 licenses was  
 \$2,519.50 (\$5,750 list price x 794 licenses = \$4,565,500; \$4,565,500 - [\$4,565,500 x .561828

discount] = \$2,000,474;  $\$2,000,474 / 794 \text{ licenses} = \$2,519.50$ ). The SnS services for 3 years totaled \$1,092,087.

70. A typical federal purchase comparable to the above commercial sale is illustrated by Carahsoft's sale to the United States Central Command ("CENTCOM") on January 24, 2008. The sale was for 460 VI3 licenses. This sale used a consolidation ratio of 4 to 1, a discount of only 39% on the licenses, and pricing at 21% of net on the SnS services for the 3-year term. In addition, the ELA was capped at 460 licenses. Thus, if CENTCOM wanted additional licenses, it would need to make another purchase, incurring additional costs for the licenses and additional costs for the SnS services on those licenses.

71. The average cost of each VI3 license on this federal sale was \$3,507.50 ( $\$5,750 \text{ list price} \times 460 \text{ licenses} = \$2,645,000$ ;  $\$2,645,000 - [\$2,645,000 \times .39 \text{ discount}] = \$1,613,450$ ;  $\$1,613,450 / 460 \text{ licenses} = \$3,507.50$ ). Thus, federal purchaser CENTCOM paid 38% more on a per VI3 license basis than did commercial Customer A above.

72. In summary, the comparable characteristics of the two sales were:

	Customer A	CENTCOM
Number of VI3 Licenses	794	460
Consolidation Ratio Used	7 to 1	4 to 1
Discount on VI3 Licenses	56%	39%
Discount on SnS Services	18%	21%
Average Cost of VI3 License	\$2,547.50	\$3,507.50
ELAs	Unlimited number	Limited to 460

73. In addition to CENTCOM paying 38% more per VI3 license, CENTCOM's future SnS costs after the third year would be \$569,381 per year for only a maximum of 460 licenses. By comparison, Customer A's future SnS costs each year after the third year would be \$598,520 for *as many licenses* as it had wanted to download during the 3 previous years. Of particular significance in the federal sale is that CENTCOM's ELA was capped at 460 licenses. Thus, the risk to VMware that CENTCOM would download additional VI3 licenses was not as great as

1 that of Customer A, since CENTCOM only had 600 servers and 1,500 CPUs, compared to  
2 Customer A's 8,000 servers and 16,000 CPUs.

3 74. If the lower 4 to 1 consolidation ratio -- the ratio provided to the government --  
4 had been given to Customer A, this commercial customer would have had to purchase 1,389  
5 licenses at an additional cost of \$3,421,250, or 75% higher than it actually did.

6 75. A table listing additional sales that demonstrate the difference in Defendants'  
7 charges to commercial customers and federal agencies is attached hereto as Exhibit A.

8 **H. VMware Set Up Carahsoft as a Sham to Attempt to Avoid False Claims Act**  
9 **Liability**

10 76. VMware was aware that it faced false claims act liability for failing to provide  
11 federal and state governments with the same prices and discounts that it offered commercial  
12 customers. Accordingly, in January 2007, in a misguided attempt to shield itself from liability,  
13 rather than list itself on the federal GSA schedule, it made a separate company, Carahsoft, the  
14 sole GSA schedule holder for VMware's products.

15 77. This scheme is evidenced in e-mails written by Aileen Black, the head of  
16 VMware's federal sales division (referred to as the "federal channel"). For example, in her  
17 weekly report dated November 17, 2006, Black wrote: "Carahsoft plan moving but need to keep  
18 on track for Jan 1. We have got to move on the [Carahsoft] GSA business plan. ORACLE had  
19 huge fine this week due to not handling this properly (I might add this is the second time!!). If  
20 we set this up now correctly we will avoid difficult issues for the future."

21 78. Similarly, in an e-mail dated January 23, 2007, from Aileen Black to CEO Diane  
22 Greene and other upper-management, Black officially announced the Carahsoft arrangement, and  
23 incorrectly stated that it "provides VMware with some added protection from the legal issues  
24 regarding best pricing practices to the government." VMware and Black mistakenly believed  
25 that if they did not have a direct contract with GSA, they would not be caught overcharging the  
26 federal government.

27 79. Carahsoft was thus nothing but a sham to attempt to shield VMware from liability  
28 for its knowing violations of pricing rules. VMware of course maintains tight control over  
Carahsoft and its practices. Carahsoft performs marketing functions controlled directly by



1 VMware, and unlike a truly independent reseller, all deals made by Carahsoft with the  
2 government must be approved by VMware.

3 80. As a result of this relationship, Carahsoft has quickly grown to be one of the top  
4 100 government technology contractors in the United States. Carahsoft's revenues jumped from  
5 merely \$91.9 million in 2006, to \$834.5 million in 2010, and over \$1 billion in 2011.

6 81. Defendants also attempted to shield themselves from liability and justify the vast  
7 pricing disparity between commercial and government by falsely claiming that the software sold  
8 to the government was different than the software sold to commercial customers. It was and is  
9 not; the software is exactly the same. Defendants attempted to concoct a differentiation by  
10 labeling software sold to the government with a different SKU number – referred to as  
11 "Government SKUs". As discussed in the interview responses below, however, there was  
12 absolutely no difference between software products that carried Government SKU numbers, and  
13 the products sold commercially under standard SKUs. In fact, during much of the time that  
14 Defendants claimed to the government to have unique products with Government SKUs,  
15 internally Defendants had not even set up a separate Government SKU product line. The  
16 existence and legitimacy of Government SKUs was another false and fraudulent claim made by  
17 Defendants to the federal Government, for both GSA and non-GSA sales.

## 18 **VII. DEFENDANTS KNEW THAT THEIR PRACTICES WERE ILLEGAL**

19 82. Defendants knew that the foregoing practices were illegal, as evidenced in  
20 multiple internal documents in Relator's possession.

21 83. For example, in an e-mail from the head of VMware's federal sales, Aileen Black,  
22 to VMware's then-CEO Diane Greene, dated May 27, 2008, Black pitched a new proposed  
23 discretionary discount program for federal customers, and plainly informed Greene of the  
24 discrepancy between government discounts and commercial discounts, stating: **"BTW the max  
25 discount on this program is much less than the non-federal program (46% vs 67%)."**

26 84. Black attached to the e-mail an executive summary of the proposed discount  
27 program. In that executive summary, provided to then-CEO Diane Greene, Black plainly  
28 acknowledged the effect of the disparity between available discount programs, stating: **"Federal  
margins have been significantly higher than commercial margins in the US . . ."**

1           85. In the executive summary, Black also emphasized that a goal of her proposed new  
2 discount structure was to “[c]onvert automatic Government discounts into discretionary  
3 discounts . . .” In that way, Black could further limit and control the amount of discounts  
4 provided to government customers.

5           86. Concerned that Black’s new program perpetuated unlawful discrepancies between  
6 commercial and government discounts, two VMware employees, Leigh Madden and Steven  
7 Houck, put a hold on Aileen Black’s proposed new program in order to conduct an internal  
8 investigation into VMware’s federal pricing practices. In response, Aileen Black, and her  
9 superior, Carl Eschenbach, expressed great frustration at the delay, and inquired about the  
10 reasons for the investigation. Houck’s response was as follows:

11                   As we were putting the program together Leigh and partners were  
12                   raising concerns about the ethics and legality of our pricing practices  
13                   in Federal. The team was meeting with disti prior to launch this past  
14                   [week] and more serious concerns were raised. I checked with Leigh  
15                   again and he expressed concern with us pricing our government deals  
16                   at a higher price than what is Commercially available. This coming to  
17                   a head on a current deal with EPA and Dell. I am being told that  
18                   Aileen is strong arming pricing that violates GSA requirements. I  
19                   have not verified this.

20                   Short of it. I don’t want to put me You or VMware at financial or  
21                   legal risk through the program.

22           87. A follow-up e-mail string from the same evening reiterated the same concerns  
23 regarding the discrepancy between federal and commercial pricing. In that string, Houck wrote:  
24 “My concern is that we are institutionalizing a pricing practice that could be off sides.” At  
25 the time of these e-mails, Carl Eschenbach was the Executive Vice President of World Wide  
26 Field Operations at VMware.

27           88. In another e-mail from the same period, Madden wrote Houck as follows:

28                   The original Federal program was based on pricing to our distributors at  
the same discount levels (20% or 25% depending on VIP tier) as the  
commercial program. There was concern amongst the VMware Finance  
team that this discount level would negatively impact our margins and the  
maximum distribution discount level approved by VMware Finance was  
15%. The 12% or 15% distribution discount for the Federal program will  
put any partner using this pricing at an 8-10% disadvantage to any similar  
partner quoting commercial pricing . . . . Our higher pricing to the US  
Government is not the industry norm and regularly results in  
questions from our partners as to why we charge the Government  
more than commercial customers. . . .

1           **We are required to disclose pricing differences between Federal and**  
 2           **commercial pricing in our commercial sales practices chart which**  
 3           **Carahsoft must submit to GSA as a part of their letter of supply**  
               **submission.**

4 (Emphasis added.)

5           89.     As part of Madden and Houck's investigation, they conducted a series of  
 6 interviews with VMware employees and resellers. The interviewees' responses reflect  
 7 widespread knowledge and concern regarding the discrepancies between commercial and  
 8 government prices. For example, Question 4 asked: "Do you have any concerns about  
 9 VMware's current partner programs or pricing practices?" Among the responses were the  
 10 following:

- 11                 •     Yes. . . . VMW positioning high pricing to Fed customer and  
 12                     partner knows we provide better pricing to commercial. Counter to  
                       what is expected.
- 13                 •     . . . . The disparity between our Fed and Commercial programs  
 14                     creates a risk for VMware. Immix key tenet - Fed and commercial  
                       programs should look alike to minimize risk.
- 15                 •     I like seeing a program being prepared to develop standard  
 16                     practices. Advice - if Fed discount standards are different from  
                       commercial, need to justify w/ GSA. . . .

17           90.     Question 5 of the survey asked: "Were you made aware of the differences between  
 18 our VMW Govt product vs. our commercial product and the additional warranties/benefits  
 19 associated with the VMW Govt product?" The responses were as follows:

- 20                 •     No.
- 21                 •     **No. There is really no difference. Smoke and mirrors.**  
 22                     Different SKUs helped us w/ GSA and to eventually have tracking  
 23                     of Gov't business. It has never been clear. No write-up that I am  
 24                     aware of. Should include warranties in the EULA. All VIP  
                       agreements must specify use of appropriate SKU.
- 25                 •     No. Partners don't perceive any difference. They look at the  
                       comm. vs. Fed delta and quote commercial pricing open market.
- 26                 •     No.
- 27                 •     No
- 28                 •     Yes. It was explained one year ago. Customers are not aware. HP  
                       has different SKU structure for Federal - common criteria etc.

1 • No

2 • No

3 91. Question 8 asked: "Is there anything else you would like to address regarding  
4 VMware or the VMware Federal partner program?" Among the answers were the following:

5 • To remove ambiguity - have GSA come in to review program  
6 before we launch it. Ensure collaboration w/ GSA. **Parity**  
7 **between commercial and Fed programs. Must justify any**  
8 **deltas.**

9 • **Pricing to Fed Govt is higher than commercial - I am aware of**  
10 **this perception. . . . We are seeing most vendors w/**  
11 **Commercial/Fed pricing parity. . . .**

12 92. In a power point document summarizing the results of the interviews, several  
13 suggestions were made to alter VMware's federal pricing practices. Among those were to:  
14 "Remove commercial pricing advantage to create incentive for partners to use program pricing,"  
15 and "Address concerns about pricing inequity to Gov't."

16 93. The results of the investigation and interviews were shared with upper  
17 management at VMware, all of whom knew of the GSA most favored customer requirements.  
18 For example, in the executive summary Aileen Black provided to then-CEO Diane Greene on  
19 May 27, 2008, discussed above, Black wrote that one of the "Program Objectives" was to  
20 "[m]aintain compliance with Government [sic] Services Administration (GSA) commercial  
21 practices comparison requirements." (This, of course, was a purely self-serving, false statement  
22 – management and executives knew that neither the original nor proposed discount programs  
23 complied with GSA requirements.)

24 94. Because of the vast discrepancy in discount programs between commercial and  
25 federal, independent VMware resellers sometimes quoted the better commercial discounts to  
26 federal government customers. Doing so put Defendants at risk; they did not want federal  
27 government customers knowing about the much-greater discounts available to commercial  
28 customers. Accordingly, VMware management responded aggressively when resellers quoted  
commercial discounts to federal customers. For example, in or about April 2006, Defendants  
rolled out a "VPP" discount program. Aileen Black vehemently prohibited application of the  
VPP discounts to government sales, despite internal opposition, including from Relator Smith.



1 In an e-mail to Relator Smith, dated July 13, 2006, Black stated: "Fyi due to several issues  
2 including legal. This program will not be rolled out to FED."

3 95. In March 2007, enhancements were made to the VPP discount program which  
4 increased the discounts in the first three bands by an additional 5% and lowered the management  
5 approval levels. However, the discounts were still not permitted to be used in sales to the  
6 government.

7 96. Just a month later, in April 2007, the commercial channel launched a new  
8 discount program called "Advantage+" which provided discounts not related to volume of  
9 purchases. It increased a prior discount of 6% to a potential discount of 19%, representing a 10%  
10 base discount, an additional 6% rebate for selling to a new VMware customer, and an additional  
11 3% when the sale involved the new "Solution Track" methodology. Elliot Fliesler, VMware's  
12 Senior Channel Demand Program Manager, sought to obtain Smith's signature on the  
13 Advantage+ program guide on April 4, 2007. In response to Fliesler's email to Smith and Black,  
14 Black sent an email to Smith on April 5, 2007, stating:

15 These need to clearly state that these are not applicable to the Government  
16 sales direct or indirect. We already offer rebates in our program. You  
17 need to alter this before it goes out. Ed [Edward Gibson, Inside Sales Rep  
18 and later Federal Channel Sales Manager] can you make the suggested  
19 changes and send back to Dane. This is extremely  
20 important!!!!!!!!!!!!!!!!!!!!

21 Smith replied to Black the next day with "cc's" to Jennifer Baker ("Baker"), formerly employed  
22 by VMware as Channels Sales Manager, and Edward Gibson that: "First I heard that this should  
23 not count. I do not agree." As a result, Baker emailed to Smith that same day:

24 Colleen (and Brandon and Alan) [Colleen Lenihan, Director of Channel  
25 Development, Brandon Sweeney, Director of Americas Channel Sales, and  
26 Alan Geary] are very aware that this new program can't be used for Fed  
27 customers .... When we first developed the Government Opp Reg program,  
28 we were unaware that this new program was being developed .... I think  
it's a huge disadvantage for Fed that the programs are different and that  
the new program is better than ours.

97. Black continued to remind VMware management that the federal channel did not  
have the same volume discounts and prices as the commercial channel. She sent Amaury  
Gallisa, formerly employed by VMware as Vice President of World Wide Channels, an email  
regarding the VPP on June 25, 2007, stating:

Again, I have pointed this out time and time again. Do these documents note that this [does] not apply to the government? I don't want to be chapter 2 in the investigation under EMC's situation. WE still haven't gotten any response on the TPP program [the government's volume pilot plan that was rolled out in July 2007]. I am more than just [a] little frustrated and without being clear on this issue we are putting the company at risk.

98. Black continued to be upset that VMware resellers were quoting government buyers with the commercial discounts, and worried that by doing so, it would become clear to the Government that it was not receiving the same prices offered to commercial customers. In her Weekly Report - Public Sector ("Report") to Smith and his management team on August 11, 2007, she stated:

VPP continued to be "accidentally" used with government accounts. This is a serious issue. TPP promo rolled out to help but still has continued. GSA is spending more time finding companies to fine (just ask SUN, EMC, and Oracle) than working on their day job. It is very profitable when you fine folks 100 million. This is serious. The times have changed and they are cracking down and cracking down hard.

99. In March 2008, sales representatives from AltTech, one of VMware's authorized resellers, sought to sell VMware products to the United States Department of Agriculture ("USDA") utilizing the Carahsoft GSA contract. AltTech had provided pricing information to USDA based upon the standard commercial discounts it had previously used in its commercial sales. However, VMware's federal channel prohibited AltTech from offering the standard commercial discounts to the USDA. Leigh Madden ("Madden"), VMware's Director, Public Sector Partner Sales, sent an email, dated March 13, 2008, to Brian Johnson and John Stubbs of AltTech stating:

There appears to be some confusion on your end. Reviewing our conversation yesterday:

1. I stated that Federal transactions were not eligible for commercial pricing/programs. This is clearly stated in VMware partner central and on the opportunity registration page. Currently we have only one dealer approved for Federal business - Carahsoft. We mistakenly accepted the S1 - USDA registration with AltTech manually added to the preferred distributor box, so we agreed to provide an AltTech discount of 25% for an Enterprise VAR plus an additional 6% for this transaction only. There was no discussion of any further discount or rebate nor applicability to any other deal.

///

1 100. In a subsequent email to Brian Johnson and John Stubbs on March 20, 2008,  
2 Madden stated:

3 I want to follow up to our recent conversation regarding USDA with an  
4 email highlighting the specific programs referenced during those  
5 discussions. The following commercial discounts/programs are not  
6 applicable to VMware's US Federal Government business:

- 7 1. Advantage + Opportunity Registration
- 8 2. Advantage + New Account
- 9 3. VPP
- 10 4. Influence +
- 11 5. ELA Registration

12 All existing VMware Federal Government channel discount programs are  
13 run through our Government Dealer Program. Carahsoft is currently the  
14 only authorized VMware Government Dealer. All reselling partners must  
15 register and transact Federal Government business using Federal  
16 Government discount programs through Carahsoft.

17 We discussed the USDA and DOE/INL transactions that were improperly  
18 priced by AltTech using commercial discount programs.

#### 19 **VIII. THE COVER UP: RETALIATION AGAINST RELATOR**

20 101. As Relator Smith reported, investigated, and attempted to stop the fraudulent  
21 conduct of Defendant VMware, VMware attempted to cover up its scheme by threatening,  
22 discriminating against, and ultimately discharging Relator.

23 102. Beginning in January 2009, Smith was asked to fully cooperate with VMware's  
24 ethics and compliance investigation involving Eschenbach and other VMware executives'  
25 fraudulent pricing practices of overcharging the federal government, partner and employee claims  
26 of unethical price fixing and restraints of trade, age and gender discrimination, and other acts of  
27 illegal workplace practices and corporate malfeasance. The investigation was led by Susan  
28 Insley, Vice President of Internal Audit at VMware ("Insley").

103. Smith took action to stop VMware's fraudulent practices and other illegal acts by  
fully cooperating with VMware Human Resources, Internal Audit, Compliance, and Ethics  
departments' requests for information by providing them with detailed reports when such  
violations occurred.

104. As part of VMware's ethics and compliance investigation, Smith met with Lori  
Martinez, VMware's Director of Ethics and Compliance ("Martinez"), and Insley in February  
2009 to report VMware's fraudulent pricing practices of overcharging the federal government, as  
well as other fraudulent and unlawful conduct by senior VMware executives. These sessions

1 took place during the course of three (3) days for approximately 18 hours. Additionally, Smith  
2 exchanged emails and participated in phone calls with Martinez and Insley concerning VMware's  
3 fraudulent pricing practices and other unlawful conduct by senior VMware executives.

4 105. During these internal federal pricing investigation sessions, Smith explained how  
5 Eschenbach and other senior executives at VMware manipulated federal pricing so that the  
6 federal government paid more than VMware's commercial customers. They manipulated federal  
7 pricing by offering commercial customers a higher consolidation ratio (such as 10:1) than the  
8 consolidation ratio offered to the government (such as 4:1); providing greater discounts when  
9 selling to commercial buyers than when selling to the government through the Carahsoft  
10 contract; using different methods to price their support services for commercial customers and  
11 government purchasers, which resulted in lower annual maintenance prices for commercial  
12 clients than for government customers; and employing different terms and conditions in  
13 VMware's commercial business contracts than in Carahsoft's contracts for sales of VMware's  
14 products to the government. Smith also presented detailed spreadsheets which evidenced the  
15 manipulation of the consolidation ratios by Eschenbach and other senior VMware executives.

16 106. Beginning in or about the week of February 16, 2009, Insley met with, among  
17 others, Steve Houck and Carl Eschenbach to discuss VMware's internal federal pricing  
18 investigation into fraudulent pricing practices of overcharging the federal government, as well as  
19 other fraudulent and unlawful conduct by senior VMware executives, including Eschenbach and  
20 Scott Aronson, Vice President of Global Accounts.

21 107. During the height of this internal federal pricing investigation, Smith was told to  
22 watch out and be careful around Eschenbach and Aronson because Eschenbach suspected that  
23 Smith had reported fraudulent federal pricing practices at VMware and blamed him for getting  
24 investigated in the first place.

25 108. Aware of the dangers that Eschenbach, Aronson, and other senior VMware  
26 executives presented, Smith gave his wife specific written instructions in the event that he was  
27 harmed during a business trip to Europe.

28 109. Several months later, Smith continued to take action to stop VMware's fraudulent  
practices and other illegal acts by giving deposition testimony in a matter filed by another former

1 VMware employee, John Wheeler, against VMware. VMware's in-house and outside counsel  
 2 were present at the deposition. On August 11, 2009, he testified regarding VMware's fraudulent  
 3 federal pricing practices:

4 Q: Have you ever seen or heard of any unfair pricing practices at  
 5 VMware? (163:12-13)

6 THE WITNESS: Yes. (163:16)

7 Q: Okay. Who has shared with you that they have seen unfair pricing  
 8 practices at VMware? (163:22-23)

9 A: My federal organization when I was in the role of the Americas.  
 10 (163:24-25)

11 Q: Who in your federal organization shared with you that they  
 12 perceived or saw unfair pricing practices at VMware? (164:1-3)

13 A: Steve Hauck. (164:4)

14 Q: Anyone else beside Steve Hauck within the federal organization  
 15 that shared with you his or her belief that there were unfair pricing  
 16 practices within VMware? (164:18-21)

17 A: Leigh Madden. (164:22)

18 Q: Anyone else? (165:3)

19 A: Joel Davis. (165:4)

20 Q: Anyone else? (165:5)

21 A: Jennifer Baker. (165:6)

22 Q: What did Steve Hauck tell you about what he perceived or saw at  
 23 VMware in terms of unfair pricing practices? (165:9-11)

24 A: He had received complaints from his channels employees that  
 25 supported the federal group. He had spoken with partners - this is  
 26 what he shared with me - that were making strong claims of unfair  
 27 pricing or trying to prevent partners from being involved in  
 28 opportunities.

He suggested that he knew that we were pricing the products  
 differently in the federal space and that we had not done our due  
 diligence on how to do that appropriately without creating an issue  
 for same product, different price for the government. (165:12-22)

....

Q: Okay. When he was sharing these concerns with you about  
 channel employees complaining, partners pricing in the federal  
 space, and it just needed to be fixed quickly, was he asking you to  
 support him in raising this with upper management? (166:15-19)



1 A: Yes. (166:20)

2 Q: And did you support him in raising this issue with upper  
3 management? (166:21-22)

4 A: Yes. (166:23)

5 Q: Who in upper management at VMware did you raise Steve Hauck's  
6 concerns about the channel employees complaining and the  
7 partners complaining about pricing-related issues and that it needed  
8 to be fixed quickly? (167:18-22)

9 A: Brian Almas. (168:10)

10 Q: Okay. (168:11)

11 A: Carl Eschenbach, Leigh Madden, Brandon Sweeney, Joel Davis.  
12 There is no one else. (168:12-13)

13 Q: During what period of time were you talking to Brian, Carl, Leigh,  
14 Brandon and Joel about the subject of these pricing issues at  
15 VMware? (169:1-3)

16 A: Late spring, let's say May, June of 2008, July, August 2008.  
17 (169:4-5)

18 Q: So why don't you tell me what the message you delivered to Joel,  
19 Brandon, Carl and Leigh meant. (169:13-14)

20 A: Was that we had had a number of instances where people were  
21 concerned, that maybe we needed to look into this more deeply.  
22 That Steve was assembling a team, which I think was just a small  
23 group of people, to look into this in detail. (169:15-19)

24 Q: What is "this"? (169:20)

25 A: The potential Sarbanes-Oxley price - pricing parody or pricing  
26 concerns for the federal government, as well as channel conflict  
27 issues. (169:21-23).

28 110. Approximately five months later, on January 10, 2010, Smith took further action  
to stop VMware's fraudulent practices and other illegal acts. He sent a detailed email to VMware  
employees Insley, Betsy Sutter, and Michelle Brennan, detailing numerous retaliatory acts by  
Eschenbach and other VMware employees against him for reporting VMware's fraudulent federal  
pricing practices and other illegal conduct and activities. Smith also expressed concern that he  
would suffer additional retaliation by Eschenbach and other senior VMware executives.

111. Four days later, on January 14, 2010, VMware terminated Smith.

1 112. VMware terminated Smith's employment as a retaliatory act against Smith for  
 2 engaging in lawful acts in furtherance of an action under section 31 U.S.C. § 3729. (i) Smith  
 3 cooperated with VMware Human Resources, Internal Audit, Compliance, and Ethics  
 4 departments, and its internal federal pricing investigation in early 2009 into fraudulent VMware  
 5 practices involving overcharges to the federal government. (ii) Smith gave truthful deposition  
 6 testimony regarding VMware's fraudulent federal pricing practices in the John Wheeler matter in  
 7 August 2009. (iii) Smith sent emails and made other reports to VMware concerning VMware's  
 8 fraudulent federal pricing practices and overcharging of the federal government, and documented  
 9 the retaliation and other discrimination he suffered by VMware through January 10, 2010.

10 113. Shortly after Smith was terminated, Houck was forced to resign from VMware  
 11 because he led the investigation in 2008 into VMware's federal pricing issues and enlisted Smith  
 12 to raise his federal pricing concerns to VMware's upper management (Brian Almas and  
 13 Eschenbach). Houck, who reported to VMware, Eschenbach, Black, and Smith, also reported his  
 14 concerns regarding VMware's federal pricing issues to his subordinates, including Leigh Madden,  
 15 Brandon Sweeney, and Joel Davis, and others at VMware. Smith reported Houck's concerns  
 16 regarding VMware's federal pricing practices to VMware's Human Resources (Brian Almas and  
 17 Michelle Brennan), Insley, and Martinez, and was told that they had brought this matter to the  
 18 attention of the Audit Committee of VMware's Board of Directors. In fact, everyone who  
 19 conducted the 2008 investigation led by Houck was forced out of VMware.

20 114. Thus at all times relevant hereto, each Defendant "knew" or acted "knowingly," as  
 21 those terms are defined in 31 U.S.C. section 3729, subdivision (b)(1), in making, presenting, or  
 22 submitting false claims. In that respect, each Defendant acted:

- 23 (a) With actual knowledge of the information; or
- 24 (b) In deliberate ignorance of the truth or falsity of the information; or
- 25 (c) With reckless disregard of the truth or falsity of the information.

26 115. This case demonstrates a carefully orchestrated scam designed to abscond with  
 27 taxpayer dollars.

1 **IX. CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION**

3 **On Behalf of the United States**

4 **Federal False Claims Act, Presenting False Claims**

5 **31 U.S.C. § 3729(a)(1)(A)**

6 116. Plaintiff incorporates by reference and realleges all of the allegations contained in  
7 paragraphs 1 through 115 of this Complaint as though fully set forth herein.

8 117. Defendants knowingly (as defined in 31 U.S.C. § 3729(b)(1)) presented or caused  
9 to be presented false claims for payment or approval to an officer or employee of the United  
10 States.

11 118. Through the acts described above, Defendants knowingly presented or caused to  
12 be presented, false or fraudulent claims to officers, employees or agents of the United States,  
13 within the meaning of 31 U.S.C. § 3729(a)(1)(A)(this provision replaces 31 U.S.C. § 3729(a)(1),  
14 which was in effect until the False Claims Act was amended on May 20, 2009).

15 119. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(A) and was a  
16 substantial factor in causing the United States to sustain damages in an amount according to  
17 proof.

18 **SECOND CAUSE OF ACTION**

19 **On Behalf of the United States**

20 **Federal False Claims Act, Making or Using False Records or Statements**

21 **Material to Payment or Approval of False Claims**

22 **31 U.S.C. § 3729(a)(1)(B)**

23 120. Plaintiff incorporates by reference and realleges all of the allegations contained in  
24 paragraphs 1 through 115 of this Complaint as though fully set forth herein.

25 121. Defendants knowingly (as defined in 31 U.S.C. § 3729(b)(1)) made, used, or  
26 caused to be made or used false records or statements material to false or fraudulent claims.

27 122. Through the acts described above, Defendants knowingly made, used, or caused to  
28 be made or used, false or fraudulent records and statements material to a false and fraudulent

1 claim, within the meaning of 31 U.S.C. § 3729(a)(1)(B)(this provision replaces 31 U.S.C. §  
2 3729(a)(2), which was in effect until the False Claims Act was amended on May 20, 2009).

3 123. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(B) and was a  
4 substantial factor in causing the United States to sustain damages in an amount according to  
5 proof.

### 6 **THIRD CAUSE OF ACTION**

#### 7 **On Behalf of the United States**

#### 8 **Federal False Claims Act, Conspiracy to Commit Violations**

#### 9 **31 U.S.C. § 3729(a)(1)(C)**

10 124. Plaintiff incorporates by reference and reallege all of the allegations contained in  
11 paragraphs 1 through 115 of this Complaint as though fully set forth herein.

12 125. Defendants knowingly (as defined in 31 U.S.C. § 3729(b)(1)) conspired to  
13 commit violations of substantive portions of the False Claims Act, including but not limited to  
14 subparagraphs (A), (B), and (G) of 31 U.S.C. § 3729.

15 126. Defendants conspired to: (1) knowingly present false records and statements; (2)  
16 knowingly make, use, and/or cause to be made and used false records and statements; and (3)  
17 knowingly make, use, or cause to be made or used, a false record or statement material to an  
18 obligation to pay or transmit money or property to the Government, or knowingly concealed or  
19 knowingly and improperly avoided or decreased an obligation to pay or transmit money or  
20 property to the Government.

21 127. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(C) and was a  
22 substantial factor in causing the United States to sustain damages in an amount according to  
23 proof.

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**FOURTH CAUSE OF ACTION****(In the Alternative)****On Behalf of the United States****Federal False Claims Act, Retention of Proceeds to Which Not Entitled****31 U.S.C. § 3729(a)(1)(G)**

128. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 115 of this Complaint as though fully set forth herein.

129. In the alternative, Defendants knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government.

130. As discussed above, Defendants received far more money from the Government than they were entitled to. Defendants knew that they had received more money than they were entitled to, and avoided their obligation to return the excess money to the Government.

131. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(G) and was a substantial factor in causing the United States to sustain damages in an amount according to proof.

**FIFTH CAUSE OF ACTION****On Behalf of Relator****Federal False Claims Act, Retaliation****31 U.S.C. § 3730(h)**

132. Relator repeats and realleges each and every allegation contained in paragraphs 1 through 115 above as though fully set forth herein.

133. VMware is covered by this retaliatory discharge statute, 31 U.S.C. §3730(h), because it sells information technology products and services to the federal government.

134. Through reporting, investigating, and attempting to stop the fraudulent conduct of Defendant VMware, Relator Smith was threatened, discharged and discriminated against in the terms and conditions of his employment by VMware because of lawful acts done by the Relator in furtherance of an action under section 31 U.S.C. § 3729.



135. Relator is entitled to all relief necessary to make him whole, including but not limited to reinstatement with the same seniority to the position he had before the unlawful termination, total target compensation as Vice President and General Manager of Americas Field Operations from 2008 to present, over-goal commissions from 2008 to present, annual merit increases from 2008 to present, continuation of all benefits from 2008 to present, 2 times the amount of back pay lost, annual merit increases that were earned but unpaid for 2008, 2009, and 2010, interest on the back pay, payment for the gains earned on non-qualified and restricted stock options, payment for the gains earned on non-qualified stock options and restricted stock units which were earned but not actually received, damage to his reputation and ability to find comparable employment in the future, compensation for any other special damages sustained as a result of the discrimination, and attorney's fees and costs.

## SIXTH CAUSE OF ACTION

### On Behalf of Relator

#### Wrongful Termination in Violation of Public Policy

136. Relator repeats and realleges each and every allegation contained in paragraphs 1 through 115 above as though fully set forth herein.

137. In doing the things herein alleged, Defendant VMware threatened, harassed and discriminated against Smith in the terms and conditions of his employment and ultimately terminated that employment.

122. This conduct was in violation of public policies pursuant to various state and federal laws, and to punish Smith for his opposition to Defendant VMware's fraudulent and illegal practices.

123. In doing the things herein alleged, Defendant violated public policy by retaliating against Smith, including creating an intolerable working environment and ultimately terminating his employment.

124. As a direct and proximate cause of Defendant VMware's wrongful conduct, Smith has suffered damages, including, but not limited to, loss of salary, commissions, annual merit increases, benefits, stock options, and other valuable employee benefits. Additionally, the actions of defendant VMware were carried out in a deliberate manner in conscious disregard of

1 the rights of Smith and were malicious, despicable and were intended to harm him. Relator is  
 2 therefore entitled to punitive damages against Defendant VMware in an amount sufficient to  
 3 punish defendant, and to deter future similar misconduct.

4 **X. PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs, by and through Relator Dane Smith, pray judgment in their  
 6 favor and against Defendants as follows:

7 1. That judgment be entered in favor of plaintiff UNITED STATES OF AMERICA  
 8 ex rel. DANE SMITH, and against Defendants VMWARE, INC. and CARAHSOFT  
 9 TECHNOLOGY CORP., according to proof, as follows:

- 10 a. On the First Cause of Action (Presenting False Claims (31 U.S.C. §  
 11 3729(a)(1)(A))) damages as provided by 31 U.S.C. § 3729(a)(1), in the amount of:
- 12 i. Triple the amount of damages sustained by the Government;
  - 13 ii. Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false  
 14 claim;
  - 15 iii. Recovery of costs;
  - 16 iv. Pre- and post-judgment interest;
  - 17 v. Such other and further relief as the Court deems just and proper;
- 18 b. On the Second Cause of Action (False Claims Act; Making or Using False  
 19 Records or Statements Material to Payment or Approval of False Claims (31  
 20 U.S.C. § 3729(a)(1)(B))) damages as provided by 31 U.S.C. § 3729(a)(1) in the  
 21 amount of:
- 22 i. Triple the amount of damages sustained by the Government;
  - 23 ii. Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false  
 24 claim;
  - 25 iii. Recovery of costs;
  - 26 iv. Pre- and post-judgment interest;
  - 27 v. Such other and further relief as the Court deems just and proper;

- 1           c.     On the Third Cause of Action (False Claims Act; Conspiracy to Commit  
2               Violations (31 U.S.C. § 3729(a)(1)(C))) damages as provided by 31 U.S.C. §  
3               3729(a)(1) in the amount of:
- 4               i.     Triple the amount of damages sustained by the Government;  
5               ii.    Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false  
6               claim;  
7               iii.   Recovery of costs;  
8               iv.    Pre- and post-judgment interest;  
9               v.     Such other and further relief as the Court deems just and proper; and
- 10          d.     On the Fourth Cause of Action (False Claims Act, Retention of Proceeds to  
11               Which Not Entitled (31 U.S.C. § 3729(a)(1)(G))) damages as provided by 31  
12               U.S.C. § 3729(a)(1) in the amount of:
- 13               i.     Triple the amount of damages sustained by the Government;  
14               ii.    Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false  
15               claim;  
16               iii.   Recovery of costs;  
17               iv.    Pre- and post-judgment interest;  
18               v.     Such other and further relief as the Court deems just and proper.

19          2.     Further, Relator, on his own behalf, pursuant to 31 U.S.C. section 3730(d),  
20       requests that he receive such maximum amount as permitted by law, of the proceeds of this  
21       action or settlement of this action collected by the United States, plus an amount for reasonable  
22       expenses incurred, plus relator's attorneys' fees and costs of this action. Relator requests that his  
23       percentage be based upon the total value recovered, including any amounts received from  
24       individuals or entities not parties to this action.

25          3.     Further, Relator requests that, as a result of VMware's unlawful employment  
26       actions, Relator receive all relief necessary to make him whole pursuant to 31 U.S.C. § 3730(h),  
27       including reinstatement, lost earnings, commissions, merit increases, benefits, back-pay, interest,  
28       losses on stock options, damage to reputation and other consequential damages, compensation  
     for any other special damages, double damages, and attorney's fees and costs;

1           4.       That, as a result of VMware's unlawful employment actions, Relator receive all  
2 relief necessary to make him whole pursuant to federal and state causes of action for wrongful  
3 employment conduct, retaliation, and termination;

4           5.       That, as a result of VMware's violation of public policy, Relator receive all relief  
5 necessary to make him whole pursuant to federal and state law, including punitive damages;

6           6.       That Relator be awarded all costs of this action, including attorneys' fees and  
7 expenses; and

8           7.       That Relator recover such other and further relief as the Court deems just and  
9 proper.


10  
11 Dated: February 29, 2012

**FRIEDLANDER, FRIEDLANDER & EARMAN, P.C.**

12  
13 By:   
14 MARK P. FRIEDLANDER, JR.  
*Attorneys for Relator and Plaintiff Dane Smith*

15 DATED: February 29, 2012

**COTCHETT, PITRE & McCARTHY, LLP**

16  
17 By:   
18 NIALL P. McCARTHY  
19 JUSTIN T. BERGER  
*Attorneys for Relator and Plaintiff Dane Smith*

20 DATED: February 29, 2012

**LAW OFFICES OF JEFFREY F. RYAN**

21  
22 By:   
23 JEFFREY F. RYAN  
24 *Attorneys for Relator and Plaintiff Dane Smith*